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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 776

LYMAN P. RHODES, JR., PETITIONER

VS.

METROPOLITAN LIFE INSURANCE COMPANY, RESPONDENT.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The petition here is for certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, to review its decision which has affirmed the action of the trial court in directing a verdict for respondent, the defending insurance company.* Petitioner, Lyman P. Rhodes, had sought to recover the sum of $20,000.00 being the face amount of a life insurance policy issued by Metropolitan Life Insurance Company, respondent, upon the life of Jacob M. Dampf, now deceased. Rhodes, the named beneficiary, and Dampf had been business partners.

*Rhodes v. Metropolitan Life Ins. Co., 172 F. (2d) 183 (U.S.C.C.A., 5th, 1949).

The defense, upheld by the trial court and the Circuit Court of Appeals, was that, in order to obtain the insurance, Dampf had fraudulently misrepresented that he was in good health at the time of his application for the policy and, by false statements in his application, had concealed from respondent insurer the fact that shortly prior thereto he had been examined by his physician, Dr. E. K. Hirsch, who advised him that he was suffering from diabetes and treated him for this ailment for some time.

Dampf applied for the policy on June 19, 1947, and paid the semi-annual premium of $307.00 in advance. Upon subsequent acceptance of the application by Metropolitan, the policy was made effective as of the date of the application.

Dampf died of coronary thrombosis (at the age of 52) on September 11, 1947, less than three months after the effective date of the policy, and well within the two-year contestable period.

Investigation into the health history of Dampf revealed a history of diabetes and treatment therefor by Dr. Hirsch, who made a diagnosis of diabetes as a result of blood sugar tests and urinalysis. Dampf went to Dr. Hirsch for examination and treatment in 1945, and again on February 28th, March 5th, March 19th and March 25, 1947, this last date of consultation being less than three months prior to Dampf's application for the life insurance policy. Dr. Hirsch specifically told Dampf that he was an incurable diabetic. (See quotations from Transcript, below).

A photostatic copy of Parts A and B of Dampf's application for the insurance policy was attached to and made a part of the policy when issued. The policy and application were filed

herein (D-13). Attention is drawn to the following questions and answers appearing in part B of the application:

QUESTION NO. 8: "Have you ever been told that you had albumin or sugar in your urine? If yes, state when, for how long and describe treatment received.

ANSWER: **"No.**

QUESTION NO. 11: ". . .(c) Have you ever had any ailment or disease of the Stomach or Intestines, Liver, Kidneys or Genito-Urinary Organs?

ANSWER: **"No.**

QUESTION NO. 12: ". . .(c) Have you ever had Diabetes, Pleurisy or Pneumonia?

ANSWER: **"No.**

QUESTION NO. 12: ". . .(g) Have you consulted a physician for any ailment or disease not included in your above answers?

ANSWER: **"No.**

QUESTION NO. 13: "What clinics, hospitals, physicians, healers or other practitioners, if any, not named above, have you consulted or been treated by, within the past five years? If none, so state.

ANSWER: **"None."**

Respondent submits that it was fully proved on trial that the answers to each of the foregoing questions were not true, but were utterly false and inaccurate, that Dampf knew them to be false and inaccurate at the time, and that he deliberately and purposely gave the said false answers as material inducements to the respondent to issue to him the policy of life insurance.

A REVIEW OF THE EVIDENCE

Lyman P. Rhodes, Jr.:

The petitioner, Lyman P. Rhodes, Jr., testified first, and upon cross-examination, admitted that Mrs. Dampf had told him that her husband "had consulted Dr. Hirsch and that Dr. Hirsch had diagnosed [Mr. Dampf's condition] . . . as diabetes." (Tr. 18). After the petitioner had testified and offered the policy, he rested his case.

Dr. E. K. Hirsch:

The first witness for the defense was Dr. Hirsch, who had diagnosed Dampf's ailment as diabetes and had treated him for it. Dr. Hirsch testified that he first saw Jacob Dampf professionally on July 9, 1945, when he complained of frequency and burning on urination (Tr. 31). He next saw him on February 28, 1947, when he complained of boils (Tr. 31). Examination on that date revealed "sugar in his urine" (Tr. 32). Dr. Hirsch told Jacob Dampf that he had sugar in his urine and requested him to save his urine and submit it to Dr. Hirsch for twenty-four hour examination. (Tr. 32)

"Q. Did you tell him he had sugar in his urine?

"A. Yes, sir; told him why we should examine the twenty-four hour specimen." (Tr. 32-33)

Then the doctor sent Dampf to the hospital to have a blood sugar test made. That test showed sugar to such an extent that continued "examination and observation" was deemed necessary ". . . to determine definitely whether it was a diabetic condition." (Tr. 33)

Dr. Hirsch then stated:

"From then on, we gave him a certain definite diet; gave

him a little apparatus with which our patients test their own urine." (Tr. 33)

He testified further that Dampf sent specimens of his urine to him on February 28th, March 1st, March 2nd, March 3rd and March 4th and that, on March 5, 1947, (Tr. 34) he saw Dampf again. He said:

"At that time we made a diagnosis of diabetes.

"Q. **Did you so inform Mr. Dampf?**

"A. **I did.**

"Q. And then you saw him again?

"The Court: What date was that?

"The Witness: The fifth of March.

"By Mr. Porter:

"Q. **That was when you told him definitely, he had diabetes?**

"A. **That's right. We outlined a diet for him, and asked him to keep an absolute record of every mouthful he ate, and his sugar tests he made at home, and to bring them back into the office.**

"Q. Did he make such tests, and keep such records?

"A. He did.

"Q. Do you have them there?

"A. I have them." (Tr. 34-35)

The records were introduced as Exhibits D-2 through D-9.

Dr. Hirsch testified that he again saw Mr. Dampf on March 19th and March 28, 1947. (Tr. 37). Thereafter, although the doctor did not change his diagnosis of diabetes and specifically told Dampf to return to the office "shortly," he never came

back to see him professionally. Dr. Hirsch had an explanation for this:

"Q. Have you any idea why he didn't come back?

"A. Yes, I have.

"Q. Why?

"A. Well I used to see quite a bit of Mr. Dampf, **and Mr. Dampf told me he wasn't going to fool with me any more; when it came time to die he was going to die.**

"Q. Did you, or not, ever tell Mr. Dampf, categorically, that he had diabetes and that he'd never get over it?

"A. Yes, **I told him he had diabetes and would never get well from it.**" (Tr. 38)

Dr. Hirsch then identified the "Proof of Death" signed by him with reference to Dampf's death (D-12) whereon he had answered the following question thus:

"6. Was the deceased afflicted with any infirmity, deformity, or chronic condition? If so, specify which, and give duration. [Answer] Yes—Diabetes Mellitus."

Dr. Hirsch was asked whether he considered diabetes an incurable disease and why he told Mr. Dampf he would not ever get over his diabetes. He answered:

"My experience with diabetes is that it is incurable." (Tr. 44)

Upon cross-examination, petitioner's counsel examined the witness as follows:

"Q. . . . Now you testified, Doctor . . .something Mr. Dampf told you, about when he was going to die he was going to die, or something to that general effect.

"A. (Nods affirmatively).

"Q. Was that while you were treating him professionally? that is, before the 28th of March, which, I think, was the last date you saw him; or was it after that?

"A. After that.

"Q. You saw him in a social or business way, did you?

"A. Social.

"Q. Can you remember, with substantial correctness, just about what he said.

"A. Well, that's pretty close to it. We had been speaking—we were playing cards one afternoon, and I had to go to the hospital to be with a lady, with an illness, and when I came back—we were all friends—somebody asked how she was; I said I didn't think she would live twenty-four hours longer. **And the conversation went on in that relative strain, about people dying when their time came, and he remarked—we were speaking about him, and I told him he hadn't been back to my office for some weeks or months. He says, 'I'm not coming back. When my time comes I'm going to die anyhow'**; some such remark with that meaning. The exact words I could not possibly remember." (Tr. 45-46)

Since the last time Dampf saw Dr. Hirsch professionally was on March 28, 1947, it is plain that the foregoing discussion at the card table was **"some weeks or months" after March 28th.** Jacob Dampf applied for the insurance policy at issue here on June 19, 1947, which was less than three months after March 28, 1947. Thus, it is unequivocally clear, that **within a very few weeks from the date of his application for the insurance policy, Jacob Dampf was discussing fatalistically with Dr. Hirsch the fact that he, Dampf, was suffering from the diabetes which Dr. Hirsch had diagnosed.**

Petitioner's counsel asked this question:

> ". . . Do you recall about how long prior to his death it was you had last seen him, in a social way?
>
> "A. No. I don't recall exactly. It could (sic) have been many days. I saw Jake quite frequently. I know I was out of town about the time of his death, and for a day or two prior to that time. Not many days, I am sure." (Tr. 48)

It is obvious from the context that the word "not" is erroneously omitted from the sentence marked "sic."

Then petitioner's counsel asked Dr. Hirsch whether, after March 25th, Dampf "carefully" followed his diet. Dr. Hirsch replied:

> "The word 'carefully' makes it hard to answer. He was continuing to diet in some manner; that is certain. We had many meals together, many refreshments in the evening together, and he would refrain from eating any highly sweet foods at that time, without any comment from me. The only comment I ever made to Jake about coming back to be checked was the time I spoke of when he said he was not coming back." (Tr. 48-49)

So it appears that Dr. Hirsch saw Dampf frequently until a few days prior to his death, in September, 1947; that, for a considerable period after March 25th, Dampf was following his diet "in some manner; that is certain;" that, with sure fatalism, on June 19, 1947, Dampf knew he was going to die; that he was fully aware of his incurable diabetic condition at the time that he gave the five knowingly false answers to his application for the insurance policy, on June 19, 1947.

* * *

Dr. Albert O. Jimenis:

Dr. Jimenis, Associate Medical Director of the respondent, testified that he was in charge of the medical underwriting of ordinary life insurance; that it was his job to examine applications for insurance and pass upon them. He said:

> ". . . We examine those papers and decide whether we want more information, whether we can issue the policy, or whether we should rate the policy, or whether we should reject the application for life insurance." (Tr. 52)

In such capacity it was Dr. Jimenis who reviewed and passed upon Jacob Dampf's application for the insurance policy here at issue.

Dr. Jimenis was shown the five negative answers which respondent has proved were falsely given, and he was asked:

> ". . . Now, Doctor, what is the policy of your company, and what would you have done, as Associate Medical Director of your Company, had those answers, or any one or more of them, been answered in the affirmative?
>
> "A. **We would not have issued this policy.**
>
> "Q. What is the policy of your company in issuing policies of insurance to those suffering with diabetes?
>
> "A. **We do not insure anyone who suffers with diabetes."** (Tr. 55)

* * *

> "Q. **I take it, these answers, having been answered negatively, was the reason why you approved his policy for issuance?**
>
> "A. **Yes sir. . .**" (Tr. 55-56)

* * *

"Q. Why does your company not insure diabetics?

"A. We consider diabetics as non-insurable because they die at approximately two and one-half times the rate of the general population, and we cannot insure them at general premiums.

"Q. Do you insure them at all? your company.

"A. **We don't consider that they are insurable at any premium.**

"Q. **You do not insure them?**

"A. **We do not.** (Tr. 58)

Dr. Jimenis was then asked what his reaction would have been if some of the questions had been answered affirmatively and some negatively. He was examined separately as to each question. In some cases he stated that he might have made further inquiry and investigation before rejecting the application for insurance. But, in every case, his final answer was the same, namely that, if there were a finding of diabetes, the application would have been rejected. (Tr. 53-59). For example, Dr. Jimenis was asked what he would have done if Dampf, in answer to question No. 13, had named Dr. Hirsch as a physician who had treated him in the past five years.

"A. We would have asked him, 'For what disease did Dr. Hirsch treat you?'

"Q. And if you had found out that the treatment had been for diabetes, what would you have done?

"A. **We would have rejected the application."** (Tr. 59)

In explanation of the fact that examination of Dampf's urine did not show sugar at the time of his application, Dr. Jimenis had this to say:

"Q. Doctor, is it possible for a person to have diabetes and for the sugar not to show up in his urine, from time to time?

"A. Yes, it is, particularly if he is under the proper treatment." (Tr. 78)

Petitioner's counsel asked Dr. Jimenis:

"Q. . . . What is the proper treatment for a known diabetic?

"A. Well, the proper treatment would be, first of all, diet, not only as to the quality of diet but also quantity of diet, the elimination of any overweight, and if necessary, and when necessary, the use of insulin." (Tr. 80)

Thus we see that Dampf, knowing he was a diabetic, undertook treatment and diet to render his urine free from sugar. Then he made application for the insurance policy here sued on. He, falsely and fraudulently, gave untrue answers to the five questions which should properly have elicited from him information as to his diabetic condition.

It is also clear that, but for the said false and fraudulent answers in the application, the insurance company would not have issued the policy here sued on.

* * *

Dr. B. E. Nelken:

Dr. Nelken signed Jacob Dampf's death certificate (Tr. 82), reciting in the blanks thereon, among other things:

"30. Immediate cause of death.

"Coronary Thrombosis with myocardial infarction.

"31. Due to.

————————(blank)————————

"32. Other conditions (Include pregnancy within three months of death).

"Diabetes Melitus (From history)." [Emphasis supplied]

A certified copy of the death certificate is filed as Exhibit D-1.

In his explanation of his writing "Diabetes Melitus (from history)," Dr. Nelken testified without objection, viz.,

"Q. Upon what basis did you write that answer?

"A. I wrote it from statements made by, I think, as I recollect, by Mr. Dampf; possibly it was Mrs. Dampf, but as I recall it, it was by Mr. Dampf." (Tr. 86)

Dr. Nelken said that Mr. Dampf told him about his diabetes when they met on a social occasion at Mr. Dampf's home, a while before he died. (Tr. 89)

* * *

Mrs. Jacob M. Dampf:

Called as a witness by the petitioner, Jacob Dampf's widow testified that, after he stopped going to see Dr. Hirsch, he continued to make tests of his urine at home, and that he followed his diet "after a fashion." (Tr. 111)

* * *

Other Witnesses:

We have reviewed above all of the testimony of any substance. Other witnesses were offered by the petitioner, in re-

buttal, and they testified in substance that the late Mr. Dampf was a business man having a good reputation.

* * *

In view of the foregoing, it is submitted that, upon all of the evidence, it is unequivocally clear that **first,** Jacob Dampf, in his application for the policy sued on, gave five separate answers, each of which was false; **second,** each of the answers was known by Dampf, at the time he made the answers, to be false; **third,** that the said answers were made by Dampf for the purpose of deceiving respondent as to the true condition of his health, in order to secure the issuance of the policy and, accordingly, the answers were not only false but fraudulent; **fourth,** the false and fraudulent answers dealt with matters material to the risk of the said policy; and **finally,** the policy would not have been issued had the true facts been disclosed by Dampf in his application for the policy, the false answers being material inducements to the issuance thereof.

Hence the insurance policy was null and void at its inception by reason of fraud on the part of Jacob M. Dampf.

APPLICABLE JURISPRUDENCE

In seeking a writ of certiorari, petitioner contends that the decisions heretofore rendered herein in favor of respondent are contrary to the established jurisprudence of Louisiana.

The first answer to this is that Your Honors have already denied certiorari in a Louisiana case raising practically identical issues.

In *Jefferson Standard Life Ins. Co. v. Stevenson,* 70 F. (2d) 72, (CCA, 5th, 1934, certiorari denied, 293 U. S. 585, 79 L. Ed. 681, 55 S. Ct. 100), the court considered a case fundamen-

tally identical to that now at bar, and held that it was error for the District Court to have refused to direct a verdict for the insurance company.

In that case,

"The Jefferson Standard Life Insurance Company issued a policy of insurance for $4,000, effective August 23, 1930, in compliance with a written application of that date, on the life of Alberta B. Stevenson. The insured died in May, 1931, within the contestable period, of tuberculosis. Her husband, the beneficiary named in the policy, brought suit upon it. The application for insurance, which was signed by the insured and attached to and made a part of the policy, contains statements in the form of questions and answers to the effect that the applicant had never suffered from any ailment or disease of the lungs; had not consulted a doctor for any other cause; had not been disabled or received medical attention within the past five years; that Dr. W. A. Rogers was her family physician; and that she was the mother of five children, the youngest being twelve months old. The application also contained the following: 'Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk and that the Company believing them to be true will rely and act upon them.' The insurance company defended on the grounds, among others, that those statements and representations of the insured were relied on by it as being true; but that they were untrue, in that at the date of the application the applicant was, and for some time before had been, suffering from tuberculosis or lung trouble, and within five years had received from Dr. Rogers medical attention because of the condition of her lungs. There was a verdict and judgment for the plaintiff. **The insurance company appeals, and assigns as**

error the denial of its motion made at the close of the evidence to direct a verdict in its favor. That motion did not set forth the grounds upon which it was based, but was in general terms.

"In July preceding the application for and issuance of the policy of insurance in August, the insured made five visits to Dr. Rogers' office, where on the occasion of each visit she was given by him an injection of sero bacterin." (70 F. 2d at pp. 72-73)

The Court of Appeals, citing *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652, (1919), then said:

"**In our opinion it was error to refuse to give the peremptory instruction.** It is undisputed that within a month before making application for insurance the applicant was in the care of and receiving medical attention from her family physician. **Whatever her own opinion as to whether she was suffering from a disease of the lungs might have been, her representation that she had not received medical attention within five years was untrue. A false representation, though made in good faith, as to a matter that is material is generally held sufficient to avoid a policy of life insurance.** *New York Life Ins. Co. v. Price,* (C.C.A.) 16 F. (2d) 660; *New York Life Ins. Co. v. McCarthy* (C.C.A.), 22 F. (2d) 241. **And this general rule prevails in Louisiana,** where this contract of insurance was made. *Lee v. N. Y. Life Ins. Co.*, 144 La. 445, 80 So. 652. The false representation was also material if the physician and his assistant told the truth. They both said the insured was told by the physician that her lungs were seriously affected. The plaintiff not being present at the interview did not and in the nature of things could not contradict that testimony. He sought to impeach the physician, but the testimony of the witness who corroborated him remains uncontradicted and unimpeached. According to the plaintiff's version, his wife was suffering from a cold to such

an extent that he himself thought it was advisable to take her to a physician for medical attention. **Under all the evidence, therefore, we think the false representation was material.** *Aetna Life Ins. Co. v. Bolding* (C.C.A.) 57 F. (2d) 626." (70 F. 2d at p. 73)

The United States Circuit Court of Appeals for the Fifth Circuit then reversed the Federal District Court because of its error in failing to direct a verdict for the defendant insurance company. The Supreme Court of the United States denied writs of certiorari (citation, supra, p. 13).

Secondly, respondent submits that the Louisiana decision relied on in the *Jefferson Standard* case, *supra*, namely *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652 (1919), does squarely uphold the decision of the Circuit Court of Appeals in the present case. In the *Lee* case, the Louisiana Supreme Court **held that where the insured falsely denied (in his application for life insurance) that he had consulted physicians, and that he had heart disease,—and where the court found that, if he had told the truth concerning his consultation with physicians and his heart disease, the policy would not have been issued,—no recovery under the policy could be had even though the death occurred from a cause other than heart disease, which cause was "Bright's Disease."**

In the *Lee* case, the widow of the insured sued upon a $2,500.00 life insurance policy, as the named beneficiary. The defense was that, although the insured had represented himself as being in good health at the time of his application, he was not so in fact and "the insurance was obtained by certain untrue and fraudulent representations and concealments with respect to material facts. . ."

The insured had applied for insurance in January, 1914. He died in August of the same year from Bright's Disease.

In the application for insurance, these questions were asked:

"9. Have you ever suffered from any of the following diseases? . . .

A. Of the brain or nervous system.
B. Of the heart or lungs.
C. Of the Stomach, or intestines, liver, kidneys or bladder
D. . . . .

"10. Have you ever consulted any physician for any ailment or illness not mentioned above?"

The insured had answered "No" to each part of Question No. 9, and added that "With the exception of malaria, as stated below, I do not recall of having ever been sick." In answer to Question No. 10, the applicant said that he had had malaria a year before for about three or four days, and mentioned no other diseases. The Court did not base its decision on the answer in 9(c) because the insured was ignorant of the fact that he had a kidney disease.

The Lee family physician testified that the insured had consulted him in November, 1911, in October and November of 1912, and six times in 1913, that he had examined the insured's urine and told Lee's wife (in 1911 or 1913) that her husband had an incurable kidney disease. The wife had urged the doctor not to tell the husband of this. The doctor did not remember that he had told the insured of his kidney trouble, but testified that he did tell the insured that he had a bad heart and should be careful. (144 La. at p. 449). A Dr. Stafford

testified that he was called to visit the insured one night in May, 1912, and had found him in bed with a bad heart lesion, but did not tell the insured what was the matter, although he prescribed medicine and advised rest. But Dr. Stafford testified that the insured certainly knew that he had been sick.

In upholding the defendant insurer, and denying recovery on the life insurance policy, the Court said:

> **". . . there is nothing which . . . breaks the force of the testimony of . . . (the doctors) . . . to the effect that he (Lee) consulted them during the two years preceding the date of the accident . . . which testimony, we think, is determinative of the case; for if,** instead of answering that he had never suffered from either of the diseases indicated or enumerated in question 9, and had not consulted a physician for any other ailment or illness except malaria, **Lee had stated what had occurred in Dr. Randolph's office within the five preceding weeks, his policy would not have been issued."**
>
> **"It is argued that he did not know that he had Bright's Disease** (but he was told by Randolph whom he was consulting at the time that he had a bad heart) . . ." (at pp. 452-453)
>
> **"It is sufficient, for the purpose of this case,** as it appears to us, **that the applicant for insurance, having, as part of his application and as an inducement to the issuance by defendant of its policy,** stated that he had never suffered from any disease of either of the organs specified in question 9 propounded by defendant, **answered the question 10 propounded to him, by saying that, save in a single instance, he had never consulted a physician for any ailment or illness, other than those mentioned in question 9; that the statement last mentioned is shown, beyond dispute, to have been untrue, to his knowledge; that it**

was material to the question to be considered by the defendant; that the defendant was thereby deceived and induced to do that which it would not otherwise have done, to-wit, issue the policy herein sued on.

"'A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat a recovery, especially where it is warranted to be true. But, even where the answers are made warranties, substantial truth is all that is required. In analogy with the rule as to the disclosure of temporary or slight ailments, it is held that medical consultation for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction of the language of the application.' 25 Cyc. 816.

". . . the ailments with which the insured . . . was afflicted are shown to have been serious, and the evidence satisfies us that he was apprised of their character, not only by what was told him, but by the treatment that he received, more particularly from Dr. Randolph. We are equally satisfied that, if defendant had been informed that Lee had had his urine tested three times within the five weeks preceding his application, it would not have insured his life without knowing the result of those tests, and that the information that was withheld was therefore material." (at pp. 453-454. Emphasis supplied)

The judgment in favor of the defendant, the insurer, was affirmed.

Summarizing the *Lee* case, where the insured had been told that he was suffering from heart disease, and where he had frequently consulted physicians within the three years prior to his application for insurance, **his failure to reveal the heart disease and his consultation with the physicians defeated**

recovery under the life insurance policy, although the death occurred as the result of Bright's (kidney) disease, of which the insured was ignorant.

So, in the case at bar, the failure of Dampf to reveal the sugar in his urine, his diagnosis of diabetes, his consultations and treatments by Dr. Hirsch, and his daily testings of his own urine to determine its sugar content (within three months prior to his application for insurance) must defeat recovery under the policy, even though the death actually resulted from coronary thrombosis. It is submitted that the doctrine of the *Lee* case fits the case of Mr. Dampf and Mr. Rhodes like a glove.

Vaughn v. Metropolitan Life Ins. Co., 3 La. App. 614 (La. App., 1st, 1925, rehearing refused 1926) was another case in which recovery under a life insurance policy was denied because of misrepresentations of health conditions in an application for life insurance. There the insured had stated that he had never suffered from any ailment or disease of the lungs and that he had not consulted or been treated by any physician within the past five years. It was shown that he had in fact consulted a doctor shortly before making his application, and that the doctor had made a diagnosis of tuberculosis. In upholding the defense that "defendant would not have issued the policy had the answers disclosed the true facts," the court said:

> **"The question is: Were the answers and statements** of James Vaughn in applying for the policy, **so material that the same must be held to have been fraudulent** and defendant thereby deceived into issuing the policy, which it would not have done had full and truthful disclosures been made in response to the question asked." (at page 615)

* * *

". . . we are satisfied from the facts . . . that **he must have been aware and was aware that he had tuberculosis** at the time he applied for the insurance; **therefore his answers amounted to a fraud on the defendant** within the sense and meaning of the law, Act 52 of 1906 . . . and as defined by the Supreme Court in Goff v. Mutual Life Ins. Co., 131 La. 98. . . ." (at p. 616)

So, also, in *Fox v. Life Ins. Co. of Virginia*, 170 So. 55, (La. App., Orleans, 1936) recovery on the policy was denied because the insured had falsely denied a history of blood in his urine. The Court said:

"A statement in an application for insurance to the effect that the applicant is in sound health and has not consulted a doctor within a given period is a representation and not a warranty; the difference between the two being that the falsity of the statement in the one case **does not vitiate the policy unless material and of such a character as may be presumed to have influenced the insurer** whereas, in the other case, the falsity of the statement voids the policy whether material or not.

"'**A representation is material when knowledge of the truth as to the fact misstated might reasonably influence the company in determining whether or not to enter into the contract as made.**' (25 Cyc. 806)" (at p. 57).

The Court then cited and quoted as its authority *Lee v. New York Life Ins. Co., supra*, and, in conclusion, denied recovery, saying:

"We cannot believe that the failure to disclose medical treatment and advice for a more or less persistent case of bloody urination was not willful.

"**In our opinion the failing to disclose this illness and medical treatment therefor constituted a misrepresenta-**

> **tion of a material fact which might have affected the consent of the insurer to the contract of insurance."** (at page 58)

Other Louisiana cases denying recovery because of false statements to the insurer as to the health of the insured are:

> *Mull vs. Sovereign Camp, W.O.W.*, 2 La. App. 401 (Orleans, 1925);
>
> *Carter vs. Life & Casualty Ins. Co. of Tennessee*, 29 So. (2d) 716 (La. App. Orl., 1947); and
>
> *Gongre v. Life and Casualty Co. of Tennessee*, 36 So. (2d) 71 (La. App., 2nd, 1948).

Respondent denies petitioner's proposition that Jacob Dampf was in good faith in making his false statements. He knew positively that he was an incurable diabetic (supra, p. 6) at the time he made his application for insurance.

We refer your Honors to the case of *First Trust Co. of St. Paul v. Kansas City Life Ins. Co.*, 79 F. (2d) 48 (CCA, 8th, 1935), from which the Court of Appeals quoted in its decision in the present case. There the Court said:

> ". . . **The issue here is not one of fact but one of law.** That issue of law is whether the evidence conclusively established the intentional fraud of the insured in the false statements contained in the application [for a life insurance policy]. That these statements were false, were material, and were intentionally false is clearly and indisputably established by this record. **The insured was a man of relatively large business affairs and must have known that the only purpose of the insurer in acquiring information concerning his history, health and habits was to enable it to determine whether it would issue a policy.** It is impossible to think that he could forget these treatments which took him away from his home and to a clinic, and all of which occurred within a few months and one

of which the day before the application, and which were continued, even to a visit made between the signing of his first application and the medical examination—the latter containing one of the false statements. **He could not have regarded a diabetic ailment as so trivial that an insurer would not want to know about it. The only possible rational explanation of his conduct is that he willfully made the false statements for the purposes of concealing the facts and of deceiving the insurer so that he might procure a policy which, if this truth were known, might be refused. In this situation of fact the only question is one of law and that is easy of solution. The law is that where the insured, in his application, intentionally makes a false statement about a material matter, the policy may be avoided.** Mut. Life Ins. Co. vs. Hilton-Green, 241 U.S. 613, 622, 36 S. Ct. 676, 60 L. Ed. 1202; Mutual Life Ins. Co. vs. Hurni Packing Co., 260 F. 641 (C. C. A. 8); Domico vs. Met. Life Ins. Co., 191 Minn. 215, 253 N. W. 538, 541; Mack vs. Pac. Mut. Life Ins. Co., 167 Minn. 53, 208 N. W. 410, 412; Flikeid vs. N. Y. Life Ins. Co., 163 Minn. 127, 203 N. W. 598, 599." (at pp. 53-54. Emphasis supplied).

Other cases where diabetic applicants for life insurance falsely misrepresented their good health, resulting in voiding of the policies are:

Kentucky Central Life and Accident Ins. Co. vs. Lynn, 304 Ky. 416, 200 S. W. (2d) 946 (1947);

Hamby vs. American Insurance Company, 37 S. E. (2d) 217 (Ga. Ct. of Appeal, 1946);

Metropolitan Life Insurance Company vs. Kaiser, 137 N. J. Eq. 95, 43 A.(2d) 677 (1945); and

New England Mutual Life Ins. Co. v. Barnett, 39 Fed. Supp. 761 (U. S. D. C., Ala. 1941, reversed on grounds further supporting its citation here, 123 Fed. (2d) 712 (1941)).

An exhaustive collection of decisions supporting the decision herein of the United States Court of Appeals for the Fifth Circuit may be found at 131 A. L. R. at 618, et seq., and in Cooley, Briefs on the Law of Insurance, 2nd Ed., 8 Vol., (1927) at pp. 3134 and 3137.

PETITIONER'S ARGUMENTS

Questions 1 and 2 (Petitioner's brief at pp. 16, et seq.)

Petitioner cites *Valesi v. Mutual Life Ins. Co. of New York*, 151 La. 405, 91 So. 818 (1922) as authority for the proposition that under the law of Louisiana, a material misrepresentation as to the health of the insured will not avoid the policy unless the bodily condition, which was the subject of the misrepresentation, subsequently actually caused death. This is the argument upon which petitioner seriously prays for a writ of certiorari.

Respondent submits that a close examination of the case clearly distinguishes it from the case now at bar and destroys it as authority for petitioner's contentions.

The pertinent defense urged in the *Valesi* case was the alleged misstatement of the assured in his application that he had not been intoxicated during the past five years and concerning his daily consumption of wines and liquors.

Respondent submits that the decision of the Louisiana Supreme Court in the *Valesi* case was simply based upon the finding of fact that the defendant had not proved the falsity of the statements. The Court analyzed **conflicting evidence** on the question of the insured's use of liquor and concluded:

". . . if we believe those most intimately associated with the deceased, **his answers were substantially correct. There-**

fore the fraudulent purpose to deceive has not been established with that reasonable certainty necessary to vitiate the policy. The trial judge, who saw and heard the witnesses testify, so concluded, and we are unable to say he was wrong." (151 La. at p. 411)

* * *

". . . It is entirely possible that the deceased, as well as many other men of integrity and veracity in good faith might not have considered him intoxicated under the circumstances disclosed by this record. Therefore, . . . **we conclude that Valesi's answers to the questions propounded in the application for the policy were substantially correct,** and that they were, at least, not fraudulent." (at p. 412. Emphasis supplied)

It is submitted that the implication of this quoted language is that if the evidence had not been conflicting and if the Court had not found that the answers were "substantially correct," but were unquestionably false (as in the case now at bar), the Court would have found fraud as a matter of law, i.e., it would have found that the "fraudulent purpose to deceive" had been established with that "reasonable certainty necessary to vitiate the policy," and it would have vitiated the policy as in the *Lee* case, *supra*.

Respondent submits that the court, in the *Valesi* case, might easily have rested its opinion with its finding of fact that the alleged misstatements of the applicant for insurance were not false but were "substantially correct." Hence the language relied upon by the petitioner here was purely obiter dictum. The language was certainly unnecessary to the decision in view of the finding of fact clearly made.

In any event, the argument which petitioner attempts to draw from this dictum in the *Valesi* case is an absurdity. It is

unequivocally clear that Jacob Dampf made misrepresentations of fact in his application for insurance of such materiality that the respondent insurer would not have issued the policy had it known the truth. There is no word of conflicting evidence on these points. It is clear from the *Lee* case, *supra*, and the other cases cited hereinabove, that such material misrepresentations amount to fraud in law so that the policy of insurance was **invalid in its inception.** No sophistry of the petitioner can explain why he argues that the question of the validity or invalidity of an insurance contract for fraud in its inception should be affected in any way by the purely fortuitous event that the insured subsequently happened to die from some other cause. Indeed, petitioner attempts no rational explanation for the novel conclusion which he reaches. The Court of Appeals, in the instant case, accurately said:

> "The argument that the misrepresentation was immaterial because the insured died from coronary thrombosis and not from diabetes, we think begs the question. The real issue has to do with the circumstances under which the defendant assumed the risk, whether it would have assumed the risk it did assume had the truth with respect to Dampf's health been made known to it. **The cause of insured's death is not important, because the insurer would have had the right to cancel the policy if insured were still living."** (172 F. (2d) at pp. 186-187)

Having cited the *Valesi* case as authority that the settled law of Louisiana supports such an absurd conclusion, petitioner then says that the *Lee* case, *supra*, should not control here because the insured, Lee, died of Bright's Disease from which he was actually suffering at the time of making his application. (Petitioner's brief, p. 19).

Since petitioner has made this argument, respondent must again call the attention of this Court to the fact that in the *Lee* case, the insured never knew that he had Bright's Disease. His doctor and his wife conspired to keep this from him to prevent him from worrying. The policy in the *Lee* case was held invalid because of material misrepresentations of the insured that he had not had heart disease (which he did know about) and that he had not consulted doctors during the two years preceding his death. See pp. 16-20, supra.

We refer again to *Jefferson Standard Life Ins. Co. vs. Stevenson, supra*, page 13, wherein Your Honors denied certiorari to the Fifth Circuit Court of Appeals. The Court of Appeals relied upon the *Lee* case, saying,

> **"Whatever her own opinion as to whether she was suffering from a disease of the lungs might have been, her representation that she had not received medical attention within five years was untrue.** A false representation, though made in good faith, as to a matter that is material is generally held sufficient to avoid a policy of life insurance. . . . And this general rule prevails in Louisiana, where this contract of insurance was made. *Lee v. New York Life Ins. Co.*, 144 La. 445, 80 So. 652. . . ." (70 F. 2d at p. 73. Emphasis supplied)

It should also be noted that, in the *Jefferson Standard* case, a false representation that the insured had not received medical attention within a certain period was held sufficient to avoid a policy. The court did not find a false representation as to the disease of the lungs from which the insured died. It would be interesting to attempt to apply petitioner's doctrine, allegedly derived from the *Valesi* case (that death must result from the disease falsely misrepresented), to a situation where the misrepresentation was not as to any particular disease but

only as to whether or not the insured had consulted physicians within a certain period. Of what particular disease would petitioner contend that the insured must die in such a case?

Incidentally, it should be remembered that Jacob Dampf also falsely represented that he had not consulted physicians other than those named in his application. It is submitted that this misrepresentation, of a material fact, would be enough, alone and of itself, to justify the decision voiding the policy.

Question No. 3 (Petitioner's brief at page 21, et seq.)

Here petitioner contends that by reason of the directed verdict his client was denied the right of trial by jury. Respondent submits that this question was fully answered by the Circuit Court of Appeals in its decision below, viz.,

> "In the face of the evidence here, it would be straining at a gnat and swallowing a camel to admit a vestige of doubt in the conclusion that it would have been error to leave the matter to the jury. Dampf's answers, in the application for the policy, to questions relating to his health, revealed that he represented that he had no disease of the kidneys, that he had never been told that he had sugar in his urine, that he had never had diabetes, and that he had not consulted with or been treated by any physician within the previous five years. **It is uncontradicted that the insured was told by his physician that he had sugar in his urine and that he had diabetes; that he was treated therefor over a period of weeks within a very short time before making his application for insurance. The evidence, therefore, leaves no room for doubt that he not only made false answers but that he knew the answers to be false. . . .**" (172 F. 2d at p. 185. Emphasis supplied)

Respondent feels compelled to call the attention of this Court to two statements in petitioner's brief which, to say the

least, are inadequately supported by the record. At page 21 of petitioner's brief it is stated that

> "There was no evidence whatever to the effect that Mr. Dampf had ever been told, or believed, or had reason to believe that he was seriously ill. . . ."

And, at page 24, petitioner argues that Dr. Hirsch had doubt as to the diagnosis of diabetes. The record in this case (quoted at pages 5-6 of this brief) is precisely contrary to these two contentions.

Petitioner cites, at page 26 of his brief, the case of *Cunningham v. Pennsylvania Mutual Life Ins. Co.*, 152 La. 1023, 95 So. 110 (1923). There are at least three reasons why that case is without application here. **First,** the defense of fraud was held unavailable because not affirmatively raised in the pleadings (152 La. at p. 1026); **Second,** the court found good faith on the part of the insured ,who was himself a physician and an examiner for insurance companies, in failing to report a disease shown by "overwhelming proof" to be a very common complaint which caused him "to consider it not of sufficient importance to be reported in his examination" (152 La. pp. 1028-1029); **Third,** there was a conflict of evidence as to whether or not the disease involved was of such importance that the insurer would not have issued the policy knowing of it. This disputed issue of fact was resolved against the insurer primarily because the insurer's application blank did not even ask a question about the ailment from which the insured had suffered (152 La. at p. 1029). Jacob Dampf, on the contrary, falsified answers to three questions which were specifically designed to elicit from him information as to his diabetic condition and he knew positively that he was incurably af-

flicted, supra, page 6. It is obvious, therefore, that the *Cunningham* case is not applicable here.

Since petitioner has cited and quoted at length (at page 28 of his brief) from *Blackwell v. Fireside Mutual Life Ins. Co.*, 11 So. 2d 65 (La. App., 1st, 1942) respondent is compelled to point out to this Court that the decision in that case was governed by a statute (Louisiana Act 97 of 1908, as amended) which deals with the **issuance of insurance policies without physical examination.** That statute created a presumption under certain circumstances "that the company has waived its rights to claim a forfeiture on the ground that the assured did not make true and full answers in the application as to his health, . . ." The court applied this statute to the case and said that, accordingly

> ". . . the defendant company is now estopped from setting up as a defense to avoid payment of the policy the alleged misrepresentations of the insured in her application." (11 So. 2d, at pp. 67-68)

Since Louisiana Act 97 of 1908 clearly has no application here, the *Blackwell* case does not support petitioner's position. Further, even in the *Blackwell* case the court was careful to say ". . . the contract can be voided on account of fraud" (11 So. 2d at p. 70).

Question No. 4. (Petitioner's brief at page 30, et seq.)

Without extended discussion, we refer to each of the points argued by petitioner. He has lettered his arguments "a" through "f," and we refer to each by its letter.

Point "a." The case he cites, *Zumwalt v. Gardner*, 160 F.

(2d) 298 (U.S. C.C.A., 8th, 1947) does not support his proposition but merely holds that

> "As to that part of the cross-examination which clearly went beyond the limits of the subject matter covered in direct examination, the witness became defendant's own witness . . ." (160 F. (2d) at p. 303).

Point "b." Although earlier objection had been made to the admission of the death certificate "for all purposes" (Tr. 19), Dr. Nelken testified later **without objection** as to how he learned that Jacob Dampf had diabetes. Then the death certificate was introduced in connection with the testimony of Dr. Nelken and was received for all purposes **without objection.** (Tr. 86-87)

"Point "c." Since petitioner takes the liberty of presenting to this Court evidence excluded below and, in addition, evidence not even offered below, we must point out that the theory of this offering in the trial court was that "If Jacob Dampf read any of the advertisements, as presumably he did, . . " (Respondent's brief to the Court of Appeals, p. 24. See also Tr. 76) he, Dampf, would have been led to believe that diabetes was not a serious disease and that the insurance company regarded it as a minor ailment only. Respondent submits that the implication that petitioner attempts to draw from the publication of the advertisements is a *non sequitur*, as an examination of them will reveal. In any event, **the advertisements never appeared in print until after Jacob Dampf was dead**, as more fully appears from photostatic copies of the two advertisements attached hereto as Annexes "A" and "B." Unlike petitioner's photostatic exhibits of those advertisements, we have reproduced them so as to show the dates of publication.

Point "d." The testimony if allowed would have been pure hearsay, and the excluded question was purely hypothetical since there was no word of evidence that Dampf ever applied to any other insurance company. (Tr. 76-77).

Points "e" and "f." The excluded testimony was obviously immaterial and irrelevant.

CONCLUSION

Rule 38 of the Revised Rules of the Supreme Court of the United States provides, in part, that:

> "(5) A review on writ of certiorari is not a matter or right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. . ."

It is submitted that no such special, important or compelling reasons for review exist in this case. On the contrary, it is submitted that the decision of the two lower courts are in full accord with justice, reason, and logic and with the jurisprudence of the State of Louisiana. The position actually assumed by petitioner herein was frankly admitted to the trial court in the following language:

"The Court [speaking to petitioner's counsel]:

". . . Assuming this was fraudulent, do you mean to say that the court is called upon to perpetuate the fraud?

Mr. Hardin [Counsel for petitioner]:

"Yes, sir." (Tr. 24)

For the foregoing reasons, it is respectfully submitted that the application for a writ of certiorari to review this case should be denied.

Baton Rouge, Louisiana
May 25, 1949

Respectfully submitted,

BENJ. B. TAYLOR

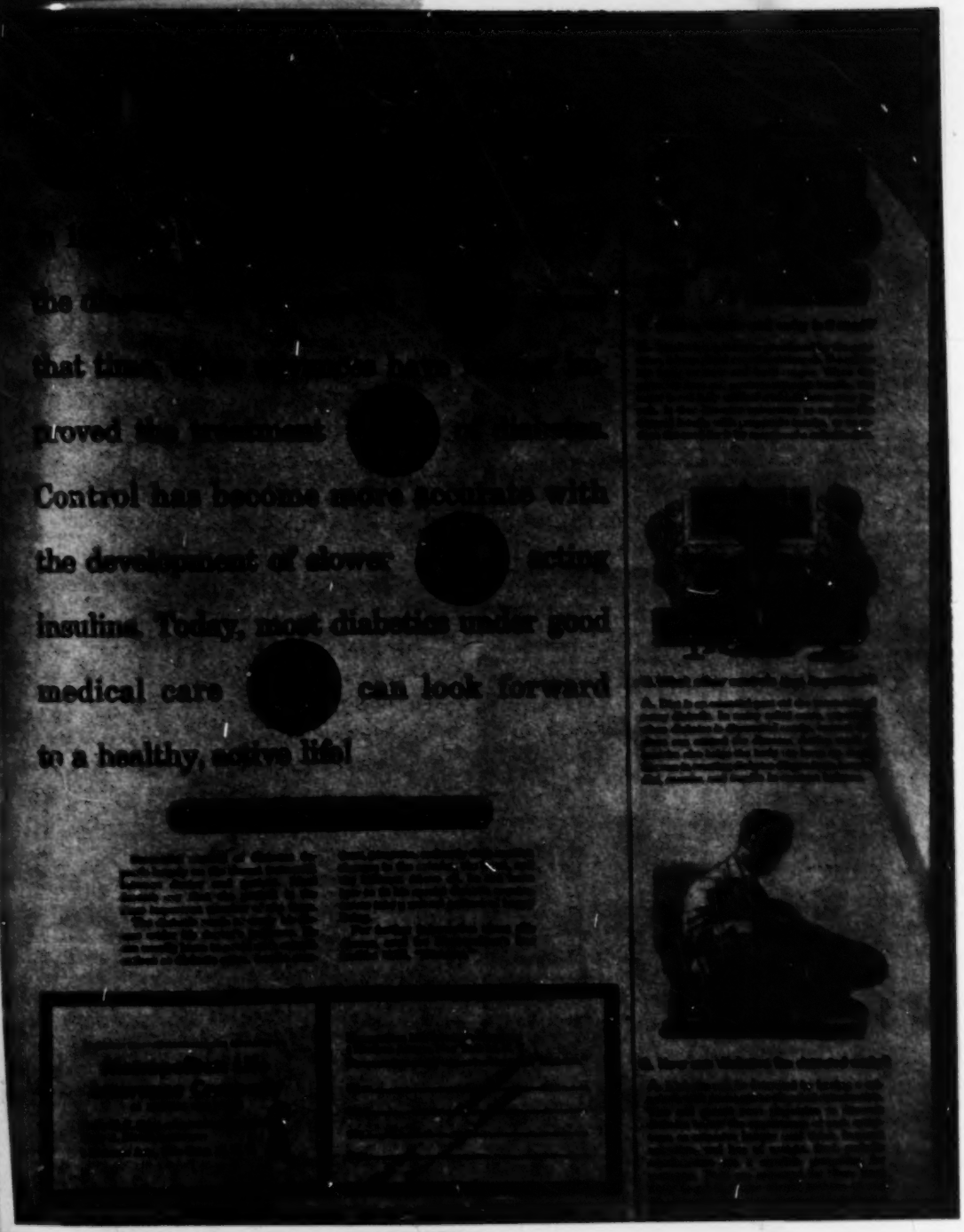
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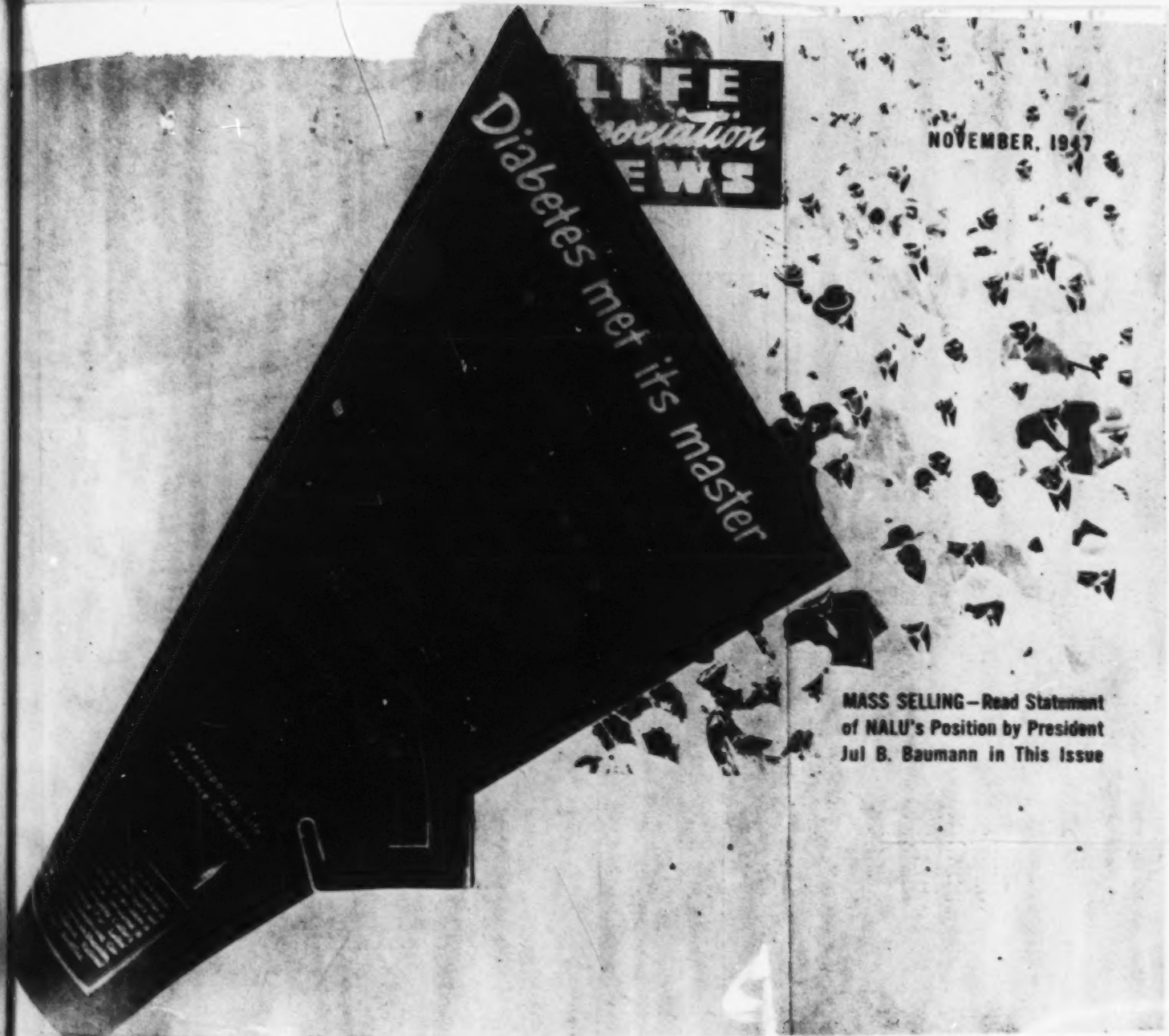
BEN. B. TAYLOR, JR.

Attorneys for Metropolitan Life Insurance Company

JAMES R. FULLER
Of Counsel



Annex "A"


LIFE
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EWS
NOVEMBER, 1947
Diabetes met its master
MASS SELLING—Read Statement
of NALU's Position by President
Jul B. Baumann in This Issue

Annex "B"